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In The

Supreme Court of the United States

October Term, 1985

THE TULALIP TRIBES OF WASHINGTON, UPPER SKAGIT INDIAN TRIBE, SWINOMISH TRIBAL COMMUNITY SAUK-SUIATTLE INDIAN TRIBE, SKAGIT SYSTEM COOPERATIVE POINT NO POINT TREATY COUNCIL, NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, MONTANA WILDLIFE FEDERATION, FRIENDS OF THE RIVER, and TROUT UNLIMITED, INC.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PARTIES

A listing of all parent companies, subsidiaries, and affiliates of the corporate petitioners is at Petition for Writ of Certiorari, ii.

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ARGUMENT

1. The Respondent's Change in Legal Position Calls for a Summary Reversal or Remand.

As a result of legislative developments subsequent to the filing of the certiorari petition, the respondent has changed its position regarding the meaning of the attorney fee provisions at issue. On August 5, 1985, President Reagan signed Public Law 99-80, the reauthorization of the Equal Access to Justice Act. As respondent points out, the 1985 legislation left unchanged the "critical 'in addition to' language;" and the 1985 legislative history "endorses petitioners' reading of the statute." Brief in Opposition (Br.Opp. 6-7). The Federal Energy Regulatory Commission "henceforth will adhere to the expression of congressional intent set forth in H.R. Rep. 99-120." (Br.Opp. 7). In other words, the Commission will no longer dispute that the Congressional intent in 28 USC 2412(b) and (d) is to allow an award of attorney fees, even though a cost award is precluded by another statute.

There is plain error in the court of appeals' opinion. That error is essentially conceded by the Solicitor General. Although the Commission contends that the Ninth Circuit opinion represents "a reasoned analysis" of the EAJA before the 1985 legislative developments, it is sufficiently persuaded by the subsequent legislative history to alter its interpretation of the controlling statutory language. Petitioners assume that the Commission has not announced its new interpretation simply because it wishes to deflate the importance of this case, but that it reversed its legal position only after careful legal analysis.

This Court has often granted certiorari and reversed summarily where the respondent confesses error. *See, e.g. Urrutia v. United States,* 357 U.S. 577 (1958); Stern and

Gressman, *Supreme Court Practice* (1978 ed.), p. 367. It should do so in this case, as well. In the alternative, petitioners suggest that the Commission's change in legal position and the new legislative developments call for vacating the ruling below and remanding for reconsideration. *See, e.g., Weinberger, et. al. v. Arellano, et. al.*, 86 L.Ed.2d 255 (1985); *Knights of K.K.K. v. East Baton Rouge Parish School Board*, 454 U.S. 1075 (1982). *See also, Supreme Court Practice, supra* at 368.

2. The Correct Interpretation of the 1980 Act Should Be Enforced in This Case.

A. Section 7 Does Not Bar Application of the Subsequent Legislative History.

The respondent makes several arguments for the Court to limit enforcement of the correct interpretation of 28 U.S.C. §§ 2412(b) and (d) to future cases. None of the arguments for future enforcement are persuasive. They hinge upon framing the issue as essentially a question of retroactive application of the 1985 amendments. However, petitioners' claim is based on the 1980 EAJA. The 1985 Act and its legislative history have become important only because they confirm the petitioners' interpretation of the 1980 Act, and because Congress found it unnecessary to amend the controlling language in order to accomplish the original intent.

Section 7 of Pub. L. No. 99-80, 99 Stat. 186, which addresses the effective date of the 1985 "amendments" is clearly inapplicable to the proper interpretation of the attorney fee language at issue, since that language has not been amended.[2] Respondent acknowledges the irrele-

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[2] Since petitioners do not rely on any 1985 amendments in this appeal, there is no need for the Court to decide whether this case was "pending" as that term was used in section 7.

vancy of Section 7, in note 8 of its brief, but then proceeds with a convoluted and tortuous argument as to why Section 7 should govern the effect of the 1985 *legislative history*, under the principles of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

Bradley deals with the effect of a new *statutory provision* authorizing attorney fees, on an attorney fee appeal. *Id.* at 710. The Court found petitioner entitled to fees, under the new provision, following the general rule that a new law should be applied absent a "statutory direction or legislative history to the contrary." *Id.* at 711.[3] The 1985 EAJA does not direct that unamended language from the 1980 EAJA should have only prospective effect.

B. Congress Intended That Its Clarification of the Original Intent Be Applied to Unresolved Fee Proceedings Filed Under the 1980 Act.

The 1985 legislative history states that clarifications of the original intent in the 1980 EAJA should be applied by the courts in cases such as this. As respondent points out, technical amendments which merely clarified the original Congressional intent, were to "have the effect of informing judicial construction of pre-1985 provisions with respect to pending cases." (Br.Opp. 9 quoting from H. R. Rep. 99-120). Respondent notes that this case would be one such "pending" case, as that term was used in the legislative history. However, respondent does not explain why Congress would have intended that courts apply its technical amendments clarifying the original intent to

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[3] Even when the law has been changed, there is no injustice in applying the new law to fee proceedings on appeal where, as here, the dispute is with the government, which has far greater litigation resources, the petitioner has rendered a substantial nationwide benefit by compelling compliance with federal law, and the agency had reason to believe it might be held liable for fees if it continued in its illegal course of action. *Bradley v. Richmond School Board*, 416 U.S. at 718-721.

pending cases such as this one, but not apply an explicit rejection of the Ninth Circuit interpretation to the same extent.

The purpose of Section 7 was

> . . . to ensure that no party is denied the protection of the act solely because of the failure of the President to approve the bill last year. It is our intent that the protection afforded by the Equal Access to Justice Act be deemed continuous from the date of its first enactment.

131 Cong. Rec. S9998 (daily ed. July 24, 1985). The 1985 EAJA was to "make permanent those provisions of the law which were originally enacted as a three-year experiment." H. R. Rep. 99-120, 99th Cong., 1st Sess. 5 (1985). To apply section 7 so as to foreclose petitioner's attorney fee claim in spite of the original intent of the 1980 act would undermine its purpose of providing continuous protection.[4] Congress certainly did not intend Section 7 to be used to cut off a fee award which it considered available under the 1980 EAJA. As Senator Domenici pointed out,

> Equal access to justice made the promise of justice to these people who had gone to great expense to challenge agency wrong, or who had successfully defended themselves against wrongful agency action.

131 Cong. Rec., *supra,* at S9998. Congress did not intend Section 7 to be used as a means of breaching that promise. It was anticipated that judicial reconsideration in light of the clarifications of the 1980 EAJA, or the 1985 amendments, would only be denied when a fee petition had been fully adjudicated "with no further appeal pending on the

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[4] As noted by respondent, subsection (b) of the EAJA, 28 USC 2412(b), which allows for fees based on bad faith or other common law grounds, never expired, since it was not subject to the original sunset provision. Respondent's Section 7 argument treats even this unexpired provision of the EAJA as a new 1985 amendment.

date of enactment." *See,* 131 Cong. Rec. H4762 (daily ed. June 24, 1985) (remarks of Rep. Kastemeier).

This case is more analogous to *Bell v. New Jersey,* 416 U.S. 773 (1983), than to *Bradley.* In *Bell,* the Court found it unnecessary to decide the retroactivity of the 1978 amendments to the Elementary and Secondary Education Act, in ruling that states were liable for misapplied federal funds. Although the 1978 version of the Act had made the liability explicit, the Court relied on the "persuasive" effect of the subsequent legislative history regarding the earlier Act's original intent, to find that the states were already liable under the prior law. *Id.* at 780-781, 784.

C. Congress Considered the Ninth Circuit's Decision to be Contrary to the Plain Meaning of the 1980 EAJA.

The fact that Congress found it unnecessary to amend the relevant language of 28 USC § 2412(b) and (d) underscores that Congress considered the original statutory language sufficiently clear. The Ninth Circuit's opinion was considered plainly incorrect and of insufficient merit to justify any statutory amendment. The House Report notes:

> Subsections 2(a) (1) and 2(a) (2) make technical changes to improve the Act and to clarify the original Congressional intent.
>
> The language of section 2412(d) (1)(A) expresses the view that prevailing parties shall be awarded attorney's fees and, when available, costs as well. This interpretation ratifies the approach taken by four circuits. *See, Hirschey v. Federal Energy Regulatory Commission,* No. 82-2170, at slip op. 5-8 (D.C. Cir., April 19, 1985); *United States v. 341.45 Acres of Land, St. Louis County, Minnesota,* 751 F.2d 924, 934 (8th Cir. 1984); *Washington Urban League v. Federal Energy Regulatory Commission,* 743 F.2d 166, 167, n.1 (3rd Cir. 1984); *United States v. 329.73 Acres, Grenada*

> *and Yalobusha Counties;* 704 F.2d 800, 808 (5th Cir. 1983). Thus, the Committee rejects the interpretations of the statute by the 9th Circuit. *See, Tulalip Tribes of Washington v. Federal Energy Regulatory Commission,* 749 F.2d 1367 (9th Cir. 1984).

H.R. Rep. 99-120, *supra* at 17.

The Ninth Circuit interpretation is inconsistent with the plain meaning of the word "any," which by definition incorporates the possibility of none. *Hirschey v. F.E.R.C.*, 760 F. 2d 305, 308 (DC Cir. 1985). In *Hirschey,* the appeals court described the Commision's fee/cost linkage argument to be "based on patently flawed premises and a wholly untenable reading of EAJA." *Id.* The Third Circuit Court of Appeals had said that the Commission's linkage argument did not even merit discussion. *Washington Urban League v. F.E.R.C.*, 743 F. 2d 166, 167 n.1 (3rd Cir. 1984).

As in *Bell v. New Jersey,* any requirement that Congress act "unambiguously" in imposing a liability was satisfied, because "the plain language of the statute" was sufficiently clear." 461 U.S. at 790, n.17.

D. The 1985 Legislative History is Entitled to Great Weight.

Even without the clear expression of Congressional intent that courts rely on this post enactment legislative history in construing the 1980 EAJA, the legislative history on the original intent would be entitled to "great weight," as a matter of common law. *See, Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380-381 (1969); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1974). As in *Heckler v. Turner,* Congress acted on its historical interpretation. No. 83-1097, 53 LW 4211, 4219 (Feb. 27, 1985) (intended clarification of current law entitled to "considerable retrospective weight"). *See, also, Bell v. New Jersey, supra,* at 784; *Seatrain Ship Building Corp. v.*

Shell Oil Co., 444 U.S. 572, 596 (1980). Congress reenacted the critical statutory language without change and ratified the interpretation in four other circuits. The 1985 legislative history has particular weight because many of the House Judiciary Committee members considering the 1985 EAJA had been actively involved in fashioning the 1980 act.[5] *See, C. Sands Sutherland, Stat. Const.* § 49.11 (4th ed. 1973).

3. The Ninth Circuit Suggested That Fees Would Have Been Awarded If Not for the Conclusion That Costs Must Be Available.

The Commission's speculations about whether fees would have been awarded in this case in the absence of the court of appeals' misinterpretation are inappropriate, and not supported by the record. It is likely the court would have found a lack of substantial justification. Read in its context, the circuit court's reference to "scanty and inconclusive" legislative history does not suggest the Commission's position was reasonable. It suggests the contrary. The point was not that there was ambiguity in the legislation prohibiting an exemption for a new "dam," but that the Commission had had no sufficient legal basis upon which to ignore the plain meaning of the word "dam" in the statute. (Pet. App. 11-12). *See, Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). On appeal, the Commission conceded that the plain meaning of the word did not support to its statutory interpretation. The court

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[5] Representative Kastenmeier, who as respondent points out (Br.Opp. 8) was chief sponsor and floor manager of H.R. 2378, which became the new Act, was Chairman of the same House Judiciary Subcommittee during its review of both the 1980 and 1985 acts. Seventeen of the members of the House Judiciary Committee in 1980 were still members when the Committee reported on the 1985 EAJA. Brownson, Congressional Staff Directories for 1980 and 1985.

of appeals took a rather dim view of the Commission's primary argument on the scope of its exemption authority, which was based on legislative history and engineering. The Court said:

> . . . There is nothing in the legislative history or language of § 2708(b) . . . which even hints at this distinction between the purpose of the structure and its effect.

(Pet. App. 12).

It is highly unlikely that the court would have expressed its "sympathy" with the petitioners "plight," if the Court believed petitioners would have been unable to recover fees regardless of the availability of costs.(Pet. App. 5).

4. A Grant of Certiorari is Appropriate.

Since there is plain error in the court of appeals' opinion, a switch in the Commission's legal position, and a Congressional intent that courts apply the 1985 clarifications of original intent to all pending cases, the Court need be less concerned with the importance of accepting review for other cases. The special circumstances of this case justify summary disposition. Granting petitioners relief need not affect the court's docket control.

This case is not limited to the interests of a single individual. The rights of six separate Indian tribes and tribal organizations, and five conservation groups, each representing numerous individuals, are at issue. Certiorari has importance beyond addressing their plight. Respondent acknowledges that at least two other cases are pending in the Ninth Circuit Court of Appeals which present a similar issue. As in this case, the Commission's speculations about the ability to prove a lack of substantial justification are not warranted, particularly in light of the

1985 legislative history on the original intent of the substantial justification test.[6] Moreover, the Commission does not mention the possibility of other cases involving other agencies, which may also turn on the effect of the 1985 legislative history in construing the 1980 EAJA.

The fact that petitioners have alleged bad faith by the Commission makes it particularly important that they have the opportunity to prove their claim, and thereby deter any such misconduct. Petitioners alleged bad faith not only in their circuit court reply brief, but also in their Joint Memorandum in Support of Motion of Attorney Fees. In their opening brief, they alleged that they had been forced to submit a substantial amount of supplemental material because of highly misleading responses by the Commission during oral argument. They relied on the Ninth Circuit holding in *McQuiston v. Marsh, supra,* which discusses bad faith as an alternative basis for fees under the EAJA. In their Reply Brief, they cited problems in obtaining compliance with the Ninth Circuit's ruling on the merits, as additional evidence of bad faith. They argued that the Commission's legal position on the merits had no basis in either the statute or legislative history and that the Commission had asserted facts in justification of its natural water feature rule, which proved to be no more than a smoke screen. They also brought to the Court's attention a Congressional investigation of public com-

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[6] The House Judiciary Committee reiterated that the government has a substantial burden of showing that an action was substantially justified. The Committee said "the test must be more than mere reasonableness." H.R. Rep. 99-120 at 9. The 1980 EAJA had been construed to require the government to show more than mere reasonableness in its position. *See, Environmental Defense Fund v. Watt,* 722 F. 2d 1081, 1085 n.5 (2nd Cir. 1983); *Spencer v. NLRB,* 712 F. 2d 539, 558 (D.C. Cir. 1983).

plaints that the Commission has been repeatedly ignoring limitations on its authority over small hydroelectric development, in order to promote private over public interests. (Pet. at 11-13).

Certiorari and a summary reversal or remand should be granted.

DATED this 26th day of September, 1985.

Respectfully submitted,

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